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THE INDIVIDUALISTIC THEORY OF THE ENGLISH LAW.

It has been said that the individualistic law of the English has been responsible for their national progress and that the communistic law of the Hindus brought down upon them indolence and stagnation. This is a broad proposition to make. Towards the making or the marring of a nation many factors enter into combination. And with all one's partiality for law as a vivifying agent in national growth one finds it impossible to give it the palm ignoring the other more important elements. And the historical truth is that nations rise and nations fall in spite of this legal theory or that. From the dim of antiquity foreign nations have been attracted by the material prosperity of India. And the wealth of *Ormus* and of *Ind* has been sung by the greatest epic poet of England. India was not then stagnant. Again, can England of the eighteenth century, the era of Elizabeth, the heyday of Mercantilism be called indolent? There was no Bentham then! To-day Japan flourishes in all the glory of material prosperity. Yet not a ripple of the Individualistic theory, which raised quite a storm in the Atlantic, has laved her shores. The Tricolor of France proclaimed the equality of mankind. And the French Revolution was the baptismal rite of the Individualistic theory. Though so recent in origin it was rapidly assimilated by Western nations; and every department of human activity was permeated with this predominant idea. Consequently the political philosophers of the first half of the 19th century hoped that the doctrine of *laissez faire* would prove the *open sesame* for national wealth and glory. A few years of the Benthamite theory have, however, taught them how its excessive adoption should necessarily be limited and corrected. Socialism is now bombarding the boasted citadels of individualism. The Labour Laws, the Factory Acts, the Land Appropriation Act, the old Age Pension Agitation, and the Insurance Bill are unmistakable indications of the old theory yielding place to new. The Government have in some instances acted on the "paternal principle" in promulgating other laws affecting society. The sanitary regulations enforced by the legislature, the interference with the trading of alcohol, the prevention of improperly qualified physicians from practising, the prohibition of the "Truck system", the invalidation of usurious contracts and the protection of children from the neglect of their parents are all instances in point. That the West itself is questioning the political wisdom of the Bentham school, is sufficient warning that we should not agitate for the blind application of Western principles to Indian conditions.

THE POSITION OF WOMAN UNDER HINDU LAW.

The Hindu law, the Hon. Justice Mr. Sankaran Nair writes, treats woman as man's property to minister to his passion, pleasure, or comfort. This, we submit, is strange misreading of not only the Hindu law, but Indian history and literature. Students of comparative jurisprudence would remember how in all those legal systems of the West which are vastly permeated with Roman conceptions blended with canonical ordinances, the idea of the "Perpetual Tutelage of Woman" was, up to very recent times, a dominant feature. It was only after the code of Napolean that married women in France obtained the power of dealing with their property. The Scottish Law has not as yet removed in full the disabilities of wives, while the laws of Scandinavia are still more remarkable for their severity to women who have a partiality for wifehood. Scarcely less stringent are the limitations placed by the common law of England upon the proprietary capacities of woman. And it was only during the latter half of the 19th century that her incapacities were removed by the legislature. [The Divorce Act of 1857 ; the Matrimonial Causes Act of 1858 ; and the Married Woman's Property Acts of 1870, 74, 82 and 93]. Those rights of property which have been secured to English women under the recent parliamentary enactments have been enjoyed by Hindu women from time immemorial. Apart from the proprietary interest that can, under Hindu law, be taken by a woman, as a wife, widow, daughter or mother, there is her peculiar right to *Stridhanam* from a variety of sources over which her husband has no control during her life and which descend to her own heirs with a preference to the female offspring. Long before Justinian codified the Civil Law or Moses promulgated the laws for the Semitic tribes, the Hindu sages have proclaimed the equality of the sexes in their domestic, social and religious rites. The Hindus and the Buddhists have been enjoined "to honour woman ; to treat her with kindness ; to be faithful to her, and to cause her to be honoured by others." Can the modern Social Reformer put the cause of woman higher and stronger ? The early codes of all nations subjected the wife to corporal punishment. But for the credit of the Hindu law, a maxim of great authority says "strike not, even with a blossom, a wife, guilty of a hundred faults." Again, in England, it was for a long time the fundamental rule that husbands and wives could not in trials, civil or criminal, be received as witnesses for, or against each other except in two cases. But in India according to Manu [M. VIII—70] a woman was competent to give evidence in a legal proceeding, on failure of persons duly qualified. Thus it will be seen that in the eye of the law the woman was not treated as man's property but really possessed full proprietary rights.

Justice Sankaran Nair had evidently in mind the apparently larger freedom enjoyed by the Western women in seeming contrastwith the injunctions of the *Smrithis* enjoining upon woman the duty of venerating her husband and of implicit obedience to him. Here again, the learned writer seems to have ignored the distinction between moral and social injunctions on the one side, and legal, on the other. To our mind, this recognition of the complete legal rights of women restrained by the injunctions on the moral and social

side is yet another instance of the political wisdom of the ancient law-givers which is nowhere more conspicuous than in the skilful and just division of rights and duties in the body social as in the body politic. Their whole aim would seem to be the securing of the harmonious combination of order and progress, to use the language of modern political philosophy. The foresight of our sages is more than amply justified by what is now taking place in the 'civilised' West.

THE PROVINCIAL INSOLVENCY ACT:—SECTION 22.

The investiture of Courts subordinate to the District Courts with limited insolvency jurisdiction has given rise to a difficulty in the proper interpretation of S. 22 of the Provincial Insolvency Act. Under S. 3, the District Courts are the Courts having jurisdiction under the Act, and under the proviso thereto the Subordinate Courts and District Munsiff's Courts can be, and have been, invested with concurrent jurisdiction in particular classes of cases. Further under S. 52 (1) the Official Receiver can be given some of the powers of the Court, subject to its direction, and sub-section (2) of that section provides that the act or order of the Official Receiver shall, "subject to the appeal to the Court provided for by S. 22," be deemed the act or order of the Court. In the case of an insolvency petition presented to a Subordinate Court and referred by it to the Official Receiver, two questions arise for consideration: (1) Whether what is provided in S. 22 is an appeal or an application; and (2) if it is an appeal, whether it lies to the District Court direct or to the Subordinate Court which referred the petition to the Official Receiver.

It is noteworthy that the word 'appeal' is not found in the body of S. 22. The words therein are 'apply' and 'application.' 'Appeal' occurs in the marginal note to S. 22—which cannot be called in aid to construe the section' See 26 A. 393 S. C.=31 I. A. 132—and in S. 52 (2), where reference is made to S. 22. After dealing with the presentment and admission of insolvency petitions, the procedure thereon, and the order of adjudication, the Act provides for the appointment of ordinary and Official Receivers in Ss. 18 and 19. Ss. 20 and 21 declare and define the duties and powers of Receivers. S. 22 thereupon provides that if the insolvent or any of the creditors or any person is aggrieved by any act or decision of the Receiver, he may apply to the Court and the Court may confirm, reverse, or modify the act or decision complained of and make such order as it thinks just. It has to be noted that this section refers to acts or decisions not only of the Official Receiver, but also of the ordinary Receiver, and to all such acts or decisions and not merely to his administrative acts under Ss. 20 and 21. It may be argued that section 22, coming as it does after Ss. 15 and 16 relating to the order of adjudication and after Ss. 20 and 21 relating to the administrative acts of the Receiver subsequent, but not antecedent, to the order of adjudication, refers only to appeals or applications against these administrative acts. There is nothing in the section itself to support this contention; while the phrase "any act or decision" may be said to point to the opposite conclusion. But that S. 22 applies also to the acts done or orders made by the Official Receiver under the powers invested under S. 52 (1), is clear from the opening words of S. 52 (2)—"Subject to the appeal to the Court

provided for by S. 22." There does not therefore seem to be any warrant for the distinction sought to be made between the judicial [S. 52 (1)] and the administrative [Ss. 20 and 21] acts of the Official Receiver in respect of the appeal or application provided for by S. 22. As for the other contention that it refers only to acts of the Receiver subsequent to the order of adjudication, it may be observed that while the scheme of an Act is a valuable guide to its construction, it may be imposing a hardship on the legislature to require it to make the scheme of the Act strictly correspond to the chronology of its subject matter.

It is however clear that in S. 22 we are at or very near before or after the order of adjudication of the insolvent, and it is only under section 24 *et seq.* that the schedule of creditors has to be framed and their debts proved before dividends are declared (S. 39) and the debtor is discharged (S. 44). It is therefore apparent from the scheme of the Act that it is premature to think of an 'appeal' under section 22. The subject of appeal is dealt with later on in section 46; and there is no sufficient reason why two appeals, though in the alternative, should be provided for, the one actually and the other virtually, against the order of the Official Receiver, and that so far apart from each other. For the effect of section 52 (2) is to render the act or order of the Official Receiver, in the exercise of powers conferred on him under section (52) 1, the act or order of the Court, in cases in which no 'appeal' (the word occurs in the section) is preferred under section 22; but where such appeal is preferred and the court passes an order thereon, such order is manifestly the order of the Court. Hence where there is an order of the Official Receiver, it may be 'appealed' against (granting for the sake of argument that it is an appeal) to the Court under section 22; or if it is not so 'appealed' against, it being the order of the Court, it may be appealed against under section 46 (1) to the District Court. Again, under this construction, not only are there two 'appeals' in the alternative, there may be also two appeals in succession, *viz.* (1) from the Official Receiver to the Court under S. 22, and (2) against the order of the Subordinate Court thereon to the District Court under S. 46 (1). While it is clear from Ss. 46 and 47 that District Courts have also appellate insolvency jurisdiction, it is not equally clear that they have jurisdiction to hear second appeals. The granting of such large rights of appeal to parties may not be conducive to speedy and effective disposal so desirable in matters of insolvency. Rather it seems to be the object of S. 46 that there should be only one appeal, whether from the Subordinate Court or the District Court, though in the former case a revision is also allowed to the High Court. Further, S. 47 (1) provides that the Court', *i.e.*, the Court exercising Jurisdiction, in this instance the Subordinate Court, has only original jurisdiction. To say that an appeal may be preferred to a court of original jurisdiction is a contradiction in terms. It may also be pointed out that under the Madras Civil Courts Act 513, the Subordinate Courts in this Presidency exercise appellate jurisdiction only in appeals referred to them for decision by the District Court, and that the District Munsif's Courts have none at all.

Granting for the sake of argument that what is provided in S. 22 is an appeal, the further question arises, to what Court does the appeal lie. It cannot lie to the Subordinate Court or the District Munsif's

Court which first entertained the petition, for neither by virtue of their constitution nor under S. 47 are they invested with independent appellate jurisdiction. The foregoing arguments against the view that S. 22 provides an appeal are also arguments against the contention that the appeal lies to the Subordinate or the District Munsiffs' court. Very clear language, and certainly much clearer language than that employed in S. 22 and S. 52 (2), is necessary to express the intention of the legislature to confer appellate jurisdiction on these courts. But if the legislature meant that the 'appeal' should lie to the District Court direct, in cases in which the Subordinate Court has referred the insolvency petition to the official receiver under the provisions of S. 52 (1), it might have clearly expressed itself to that effect, and the fact remains that it has not done so. That the distinction was apparent to the mind of the legislature between the District Court and the 'Court' is evident from the definition of the latter term in S. 2 (*g*) ["exercising"], and the provisions in S. 3 ["having"], as well as from the explicit provisions in S. 46 as to appeals to and from District Courts.

If we grant that the Subordinate Courts have appellate jurisdiction, there will arise the anamoly that the very first order of the Court may have to be one passed in its appellate jurisdiction, where an 'appeal' is preferred under S. 22. If on the other hand it is held that the appeal under S. 22 lies to the District Court, there also occurs the anamoly that, as the result of S. 52 (2), there is no order of the Court of first instance at all, the order of the Official Receiver having been appealed against. The result of this anamoly is that there cannot be an appeal to the District Court under S. 46 (1), because there is no order of the Subordinate Court to appeal against. The provisions of S. 22 and S. 46 (1) thus become mutually exclusive; and this curtailment of appeal under S. 46 (1) is, it is submitted as bad as providing a second appeal to the District Court, as shown above in case the 'appeal' under S. 22 be held to be to the Subordinate Court.

Where the Subordinate Court had exercised jurisdiction over an insolvency petition so far as to entertain it and refer it to the Official Receiver, it will be straining language a little too much to say that the District Court also *exercised* jurisdiction over it to bring the District Court within the meaning of 'Court' [S. 2 (*g*)] in S. 22. If, as is sufficiently clear, it did not and it entertains and disposes of the 'appeal' under S. 22, it is difficult to see where the further proceedings are to be continued. It is clear from S. 52. (1) ["subject to the direction of the court"] that the Subordinate Court by referring the petition to the Official Receiver does not divest itself of its jurisdiction over the petition. That jurisdiction still subsists and the District Court by entertaining and disposing of the appeal under S. 22 would, it is apprehended, be exercising concurrent jurisdiction with the Subordinate Court in which the proceedings originally commenced. While it may be permissible for one Court of concurrent jurisdiction to assume jurisdiction over a matter from the outset, it is a question how far one Court may exercise concurrent jurisdiction as to part of a matter over which the other court of concurrent jurisdiction has already exercised its legitimate jurisdiction. The order of the District Court in this case, it is submitted cannot be the order of the 'Court' exercis-

ing jurisdiction in the first instance, but is only an order of a Court of concurrent jurisdiction [See S. 17 in this connection.]

Moreover the object of investing Subordinate Courts with concurrent jurisdiction in insolvency cases is likely to be defeated if it is to be held that the 'appeal' (or 'application') under S. 22 lies to the District Court. In that case, what the Subordinate Courts may do will be nothing more than to receive the petition and refer it to the Official Receiver, and leave the parties to 'appeal' against the Receiver's orders to the District Court. But it is expedient that the Subordinate Court should have power to revise the acts and orders of the Receiver under Ss. 20 and 21; and if it can revise these acts and orders of the Receiver, there is no sufficient reason why the acts done and, orders made by the Receiver under the powers vested in him by virtue of S. 52 (1) should not be equally liable to revision by the same Court. For the jurisdiction conferred on the Official Receiver under S. 52 (1) is not concurrent with that of the Court which referred the petition. This would seem to follow from the intention of the legislature evident in S. 52 (2), that the judicial orders of the Official Receiver in respect of matters set forth in S. 52 (1) must be actually or constructively the orders of the court. If the Official Receiver had concurrent jurisdiction with the Court in respect of them, the said orders may be allowed to stand of their own force and need not be rendered constructively into the orders of the court just as the Subordinate Court exercising concurrent original jurisdiction in civil cases with the District Court passes its own orders and decrees in cases which it tried and disposed of. It cannot be said that the Official Receiver has delegated jurisdiction in the sense that the court by sending the case to the Official Receiver has *ipso facto* divested itself of its jurisdiction, for the powers under S. 52 (1) have to be exercised by the Official Receiver "subject to the directions of the court." It seems therefore that the Official Receiver is the deputy of the court which referred the petition to him, and while the jurisdiction of the referring court may flow on to him, he has no independent or concurrent jurisdiction with the referring court.

It is sometimes argued that the act or order of the Official Receiver being the act or order of the court the court cannot hear an appeal against its own act or order. This argument would seem to ignore the opening words of S. 52 (2) "subject to the appeal to the court provided for in S. 22," and the meaning of the word 'court' [s. 2 (g)].

It may also be doubted having regard to this meaning of the word 'court,' whether, on an 'appeal' (or 'application') under s. 22 to the District Court against an order of or refusing adjudication by the Official Receiver in a petition referred to him by a Subordinate Court, the District Court can pass an order granting or refusing adjudication, because under Ss. 15 and 16, it is the 'court' that can pass such an order.

It seems therefore to be almost equally anamolous, whether the 'appeal' lies to the District Court or to the referring Subordinate Court.

These considerations seem to point to the conclusion that the insertion of the word 'appeal' in the marginal note to S. 22 and in S. 52 (2) is due to inaccurate drafting, and that the proper word in both places is 'application'. The difficul-

ties above set forth disappear if it is held that an application lies to the court in its original jurisdiction under S. 22.

S. SUBRAHMANYAM.

THE WEEK'S CASES.

11th September, 1911.

Sundarier, J. and Phillips, J.

Criminal Revision 112 of 1911.

The description of a merchant as a *gumastha* in a subpœna issued on him, at the instance of the accused, may amount to defamation, under Sec. 499, I. P. C.

Criminal Revision 490 of 1911.

The District Magistrate may transfer a case, under Sec. 476 cl. (2) of the Criminal Procedure Code, without entering into the question of the jurisdiction of the Magistrate, who took cognizance of it.

12th September, 1911.

Abdur Rahim, J. and Spencer, J.

S. A. No. 1487 of 1909.

Where stamp papers are called for on a particular day and deposited the next day there is no delay to be counted in computing the time for appeal.

S. A. Nos. 766 and 777 of 1910.

Implied Contract is a question of fact.

S. A. Nos. 381 and 382 of 1908.

Where an arrangement is proved between the karnavan and the other members of a Marumakkathayam family that the karnavan ought not to borrow money or execute documents for such purpose without the consent of the other members and without their signature, it was *held* that the karnavan's power to renew without adding to the liability of the family was beyond the scope of such an arrangement.

C. R. P. 311 of 1911.

Where the High Court is asked to revise the order granting sanction to prosecute under section 476, Criminal Procedure Code it is not necessary to serve any notice upon any party or the Government Pleader.

Sundarier, J. and Phillips, J.

C. M. S. A. 235 of 1908.

An appeal lies against an order under Sec. 310 A, (O. 21, r. 89) of the Civil Procedure Code, refusing to set aside the sale.

C. M. S. A. 53 of 1910.

Although under Sec. 232 of the Civil Procedure Code, it is left to the discretion of the court either to ask the assignee to establish his right by a regular suit, or to determine his right in the execution proceedings, still after evidence is taken on the point, the court should determine the factum and the validity of the assignment in execution proceedings themselves.

C. M. A. 17 of 1910.

Where in a suit against a number of defendants, permission was obtained under Sec. 30 of the Civil Procedure Code, to sue a few of them on behalf of the community, and where the suit was subsequently restricted as against only some of the community, it is not necessary that notice should be served on the latter personally, as the court has a discretion to decide in what manner services shall be effected in any case.

13th September, 1911.

Sundarier, J. and Ayling, J.

C. M. A. 67 of 1909.

Section 258 of the Civil Procedure Code of 1882 is imperative and not a mere rule of evidence as held in 12 Bom. Law Reporter 686. Execution of one decree-holder where it is a joint decree in favour

of two could not be allowed except for special reasons under section 231 of the Civil Procedure Code.

C. M. A. 26 of 1910.

The jurisdiction of a Court in British India cannot cease by a subsequent adjudication of the matter by a foreign Court.

C. R. P. 816 of 1909.

The fact of an instrument being executed to a man described as agent does not raise any *prima facie* inference that the note was executed for the benefit of the individual though in cases where negotiable instruments are executed by a man in his capacity as Director or with the seal of the Company attached, there is an inference that the note was executed by the maker in his personal capacity.

15th September, 1911.

Abdur Rahim, J.

C. R. P. 722 and 726 of 1910.

An order of the Presidency Small Cause Court returning a plaint is not a decree or order within the meaning of Sec. 38 of that Act and no application lies to the Full Bench.

Sundarier, J. and Phillips, J.

S. A. 334 of 1911.

Where a Muhamadan husband conveys property to his wife, in lieu of dower, to be enjoyed by her for life or for any specified period, the document does not operate as a gift, but is to be construed only as a sale for a term of years, for valuable consideration.

SYNOPSES OF CASE LAW.

Emperor v. *Shankar Shrikrishna Dev*, 35 *B.* 55.

Where the accused who had made a declaration, under Act XXV of 1867, Sec. 4, as to his ownership of a press, and who had no hand in its management, was convicted of sedition under S. 124 A., I.P.C., for having printed a book on religion which, however, contained stray seditious sentences, *held* that circumstantial evidence raised a reasonable doubt as to the intention of the accused, the benefit of which must be given to him and that the presumption of guilty knowledge of the contents of a book is one of fact and not of law, which the accused may rebut.

Emperor v. *Mulshankar Harinand Bhat*, 35 *B.* 63.

When an adjudicated insolvent was prosecuted by a creditor for dishonest concealment of property under Sec. 421, I.P.C. and where it was contended that Sec. 17 of the Presidency Town Insolvency Act of 1909 requires leave to be taken of the Insolvency Court before any suit is instituted and that no leave was asked for, *held* that the Insolvency Act did not affect the Jurisdiction of the Magistrate, and that the expressions "suit" and "other legal proceednigs" in Sec. 17 mean only proceedings of a civil nature.

In re *Govind Kamath*, 35 *B.* 75.

Where of three undivided brothers, two in succession agreed to take certain properties as their share and passed to the eldest a document in the nature of a release and where the question arose if it was a release, *held* that it amounted to a partition deed.

Vasudeo v. *Balkrishna*, 35 *B.* 79.

Where the plaintiff brings the suit to establish his right to attach and sell the property in dispute as that of his judgment-debtors in execution of his decree for money, he need only prove that at the date of attachment they had a subsisting right to the property. *Held*, further, that the suit must be tried as if it were one for possession by the judgment-debtors; and that Art. 144 and not Art. 142 of the Limitation Act applied.